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No. 182

Supreme Court of the United States

OCTOBER TERM, 1959

PATRICIA I. BIRNEL, *Appellant*,

vs.

THE TOWN OF FIRCREST, *Appellee*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION

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THE TOWN OF FIRCREST,	*Appellee.*	

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION

Appellant Patricia I. Birnel submits herewith her statement particularly disclosing the basis upon which this court has jurisdiction on appeal to review the judgment of the Supreme Court of the State of Washington in cause No. 34857 affirming a judgment of the Superior Court of the State of Washington for Pierce County.

THE OPINION BELOW

The opinion of the Supreme Court of the State of Washington, the court affirming by a vote of six (6) to three (3), is reported in 153 Wash. Dec. 627. A copy of the opinions is attached hereto as Appendix A.

JURISDICTION

This action is a suit to enjoin the enforcement of Ordinance No. 323 of the town of Fircrest, which or-

dinance provides that a source of fluoridation approved by the State Department of Health be added to the water supply of the town of Fircrest under the rules and regulations of the State Board of Health, such addition to be administered in a manner approved by the State Department of Health.

2. The Supreme Court of the State of Washington handed down its opinion on February 26, 1959. Notice of appeal to this court was filed by the appellant with the clerk of the Supreme Court of the State of Washington on the 11th day of May, 1959.

3. The jurisdiction of this court upon appeal is conferred by Title 28 U.S.C.A. §1257(2), which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

As shown by the cases cited, a municipal ordinance is a "statute of a state" within the meaning of the above section. *New Orleans Pub. Service v. New Orleans*, 281 U.S. 682, 74 S.Ct. 489, 74 L.Ed. 1115; *King Mfg. Co. v. Augusta*, 277 U.S. 100, 48 S.Ct. 489, 72 L.Ed. 801; *Jamison v. Texas*, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869.

The appellant challenges the validity of Ordinance No. 323 of the town of Fircrest, a "statute of a state"

within the meaning of that provision, on the ground that, as applied to this appellant, it is repugnant to the Constitution of the United States and the decision of the highest court of the state, sitting en banc, was in favor of its validity.

4. Cases believed to sustain the jurisdiction of this court on appeal include:

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628;

Myers v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042;

Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643;

Skinner v. Oklahoma, 316 U.S. 535, 625 S.Ct. 1110, 86 L.Ed. 1655;

Frank v. Maryland, 27 L.W. 4304

5. Ordinance No. 323 of the town of Firerest, the "statute" involved within the meaning of Title 28 U.S.C.A. §1257(2), is not officially reported and reads as follows:

"An Ordinance Providing for the Fluoridation of the Water Supply of the Town of Firerest, Setting Regulations Therefor.

"BE IT ORDAINED by the Council of the Town of Firerest that a source of fluoridation approved by the State Department of Health be added to the water supply of the Town of Firerest under the rules and regulations of the State Board of Health, such addition to be administered in a manner approved by the State Department of Health." (Tr. 1-2).

QUESTION PRESENTED

The question presented by this appeal is as follows: Does Ordinance No. 323 of the town of Firerest providing that a source of fluoridation approved by the State Department of Health be added to the water supply of the town of Firerest under the rules and regulations of the State Board of Health, such addition to be administered in a manner approved by the State Department of Health, deprive the appellant of her liberty without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States in that the said ordinance, if enforced, would compel the appellant and her children to consume against her will and judgment a substance, namely, fluoride, designed to affect their bodies, which substance has been prescribed by the Town Council of the town of Firerest, and which substance administered in the manner provided in said ordinance habitually causes a pathological condition, commonly known as mottled enamel, in the enamel of the teeth of some of the persons consuming it, and the intended benefits of which substance may be obtained, by those desiring the alleged benefits, more economically and efficiently by means other than the public water supply?

STATEMENT OF THE CASE

The appellant is a citizen and taxpayer residing in and paying taxes to the appellee, a municipal corporation, and is the mother of two minor children who were seven and three years of age at the time the amended complaint was verified in June, 1958.

On July 23rd, 1957 the Town Council of the appellee enacted the above-quoted Ordinance No. 323 entitled, "An Ordinance Providing for the Fluoridation of the Water Supply of the Town of Firerest, Setting Regulations Therefor." The appellant sued to enjoin the enforcement of Ordinance No. 323 on sole ground that the said ordinance deprived the appellant of her liberty without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. In her amended complaint the appellant alleged that on March 25th, 1958 the Town Council of the appellee had awarded contracts for two units of fluoridation equipment and a tester, and that, acting through its mayor and other officers, agents and employees, appellee unless restrained and enjoined, would enforce the said ordinance and add a source of fluoridation to the water supply of the appellee.

The amended complaint further alleged that the appellant was dependent upon the water supply of the appellee for water for herself and her children to drink, and for all household and domestic purposes, and that she has no other water supply available.

She alleged that the purpose of the appellee in proposing to add fluoride to the water supply of the appellee, is not thereby to render the water supplied pure, wholesome and fit for human consumption, but is solely to affect the bodies of children who will consume the water to which the fluoride will have been added in the hope of rendering their teeth less susceptible to caries and that dental caries is not a communicable disease.

The amended complaint further alleged that the rules and regulations of the State Board of Health approving the addition of fluoride to public water supplies so as to effect a final minimum concentration of fluoride [ionized fluorine] in the water supply of .7 parts per million parts of water and a maximum concentration of 1.5 parts per million parts of water.

The appellant alleged that the ingesting of ionized fluorine by drinking water containing fluoride in the proportion approved by the State Board of Health, causes a pathological condition in the enamel of the teeth of children consuming such water, which pathological condition is commonly known as mottled enamel and that such pathological condition habitually afflicts the enamel structure of the teeth of some of the children consuming water having a fluoride concentration within the approved range and that the appellant feared that her two minor children might be among those so afflicted. She further alleged that what other effects the ingesting of fluoride by means of drinking water containing ionized fluorine in the approved proportion may have on the human body are incompletely known, and that she feared lest she and her children sustain some other effect in or upon their bodies adverse to their health, or objectionable to them, from drinking water containing fluoride as provided by Ordinance No. 323.

The appellant further alleged that fluoride might be administered in carefully controlled amounts economically, and more safely and reliably to persons desiring it through bottled water containing fluorine in the pro-

scribed amounts, in tablet form and in many other ways, any one of which methods would permit control of dosage for each individual and would be safer and more reliable than adding fluorides to the public water supply (Complaint, Tr. 1-5).

The appellee had filed a demurrer to the appellant's complaint (Tr. 8), which by stipulation was treated as a demurrer to the appellant's amended complaint (Tr. 15). The demurrer admitted for the purposes of this cause all of the allegations of the appellant's amended complaint.

After a hearing the trial court entered an order sustaining the demurrer to the amended complaint on the authority of *Kaul v. Chehalis*, 45 Wn.(2d) 616, 277 P. (2d) 352 (Tr. 12). The appellant declined to plead further, and judgment was entered in favor of the appellee on June 23rd, 1958 (Tr. 9), from which appeal was taken to the Supreme Court of the State of Washington (Tr. 10), resulting in a judgment affirming the lower court on the authority of the same decision (Tr. 19).

The Federal Questions Are Substantial

For the better part of a decade heated public controversy has persisted over the question of whether or not fluoride should be added to public water supplies for the purpose of reducing the incidence of dental caries among young children. The policy of so doing has been repeatedly submitted to the electorate of American municipalities, and the compatibility of statutes or or-

ordinances with state and federal constitutions has been frequently challenged.

In 1954, this court denied certiorari in one case, *De Argyan v. Butler*, 119 Cal. App. 674, 260 P.(2d) 98 (No. 651, cert. den.) 347 U.S. 1012, and dismissed an appeal in another, *Chapman v. Shreveport*, 225 La. 859, 74 So.(2d) 142, (No. 407, app. dis.) 348 U.S. 892, involving the general question of the authority of municipalities to fluoridate their public water supplies. Again, in 1956 this court dismissed an appeal in *Kraus v. City of Cleveland*, 163 Ohio St. 559, 127 N.E.(2d) 609, 351 U.S. 935, 76 S.Ct. 833, 100 L.Ed. 1463.

This court has many times held that the denial of a writ of certiorari imports no expression of opinion upon the merits of the case. *Atlantic Coastline R. Co. v. Powell*, 283 U.S. 398, 51 S.Ct. 498, 75 L.Ed. 1142.

The California, Louisiana and Ohio courts rested their decisions in the two above cited cases and this court dismissed the appeals in the *Chapman* and *Kraus* cases on the authority of *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 235, 49 L.Ed. 643. Neither the *De Argyan*, *Chapman* or *Jacobson* cases, all decided by sharply divided courts, nor the *Kraus* case can be deemed controlling in the instant case even if the *De Argyan*, *Chapman* and *Kraus* cases cases be deemed, *arguendo*, rightly decided.

The instant case comes before this court on demurrer. The complaint, the allegations of which are admitted by the demurrer, alleges the following facts: (1) The purpose of the ordinance authorizing fluoridation is not for

the purpose of providing pure water, but for the purpose of affecting the bodies of those drinking the water; (2) if fluoride is added to the water in the proportion authorized by the regulations of the State Department of Health some individuals will, as a result thereof, develop a pathological condition in the enamel of their teeth known as mottled enamel, or fluorosis; (3) dental caries is not a communicable disease; (4) persons desiring to have their teeth or their systems treated with fluoride for the purpose of reducing the incidence of dental caries in themselves, or who desire to have their children so treated to reduce the incidence of dental caries in their children's teeth, may do so simply, safely and economically on an individual basis by having the fluoride administered topically or in tablet form or in other measured doses on the prescription of their individual physicians or dentists.

The important fact that it is not necessary that fluoride be added to the public water supply system or to drinking water at all in order to make it economically available to those desiring such medication was not made to appear in the *De Aryan*, *Chapman* or *Kraus* cases, and that fact in itself renders the question raised by this complaint under the Fourteenth Amendment of the Constitution of the United States important and substantial. The admission of the fact that there are other economical, simple and safe methods of administering fluoride available to the individual necessarily means that the Town Council by Ordinance No. 123 has passed the bounds of what may be reasonably considered "necessary" for the protection of the public

health, welfare and morals, and has therefore transcended the bounds of the police power. *This we feel obviously raises a question of substance.*

The *Chapman* and *Kraus* cases, *supra*, are not in point here (a) because the availability of other, voluntary means of accomplishing the desired result was not made to appear, and (b) those cases were expressly distinguished by the Supreme Court of Indiana in *Teeter v. La Porte*, 236 Ind. 146, 139 N.E.(2d) 158, and implicitly by the Supreme Court of Canada in *Municipality of Metropolitan Toronto v. Village of Forest Hill* (1957) 9 D.L.R.(2d) 113, *infra*.

Heretofore, the exercise of the police power has been limited to the purpose of protecting members of the community from one another, from the spread of *communicable* diseases, *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643.

In the instant case the Town Council seeks to protect the inhabitants from themselves, decide what is good for them and compel them to do what the Town Council believes will be good for them even though the inhabitants can act in this instance more safely and effectively for themselves.

Freund, in his work on Police Power, § 143, says:

> "The questions which present themselves in the examination of a safety or health measure are: does a danger exist? is it of sufficient magnitude? does it concern the public? does the proposed measure tend to remove it? is the restraint requirement in proportion to the danger? *it is* [*sic*] *possible to secure the object sought without impairing* [illegible]

sential rights and principles? does the choice of a particular measure show that some other interest than safety or health was the actual motive of the legislature?" (Emphasis supplied).

If the police power is extended this far, then it is virtually unlimited. It is, of course, obvious that unlimited police power equals the police state.

In the *Jacobson* case, *supra*, this court upheld a compulsory vaccination statute against the contention that it constituted an invasion of liberty, justifying its decision in the light of a smallpox epidemic in Cambridge, Massachusetts. In upholding this legislation as constitutional, the court, speaking through Mr. Justice Harlan, recognized that the measure involved an infringement of individual liberty, an infringement which was justified only on the ground that the individual, if permitted to exercise his liberty not to be vaccinated would constitute a menace to the health and welfare of society as a whole. The court said:

"Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. . . .

"*Upon the principle of self-defense of paramount necessity a community has the right to protect itself against an epidemic or disease which threatens the safety of its members.* . . .

"*There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to in-*

terfere with the exercise of that will. But it is equally true that in every well-ordered society, charged with the duty of conserving the safety of its members, the rights of the individual in respect to his liberty may at times, under the pressure of great dangers, be subjected to such restraint to be enforced by reasonable regulations as the *safety* of the *general public* may demand." (Emphasis supplied) 197 U.S. 11, 26, 27, 29.

Note the emphasis on the "safety" of "others."

Mr. Justice Harlan speaks of the principle of self-defense of society. The principle upon which the court upholds compulsory the vaccination law has two complementary theories as its basis: One, the principle that within the framework of a democratic society, individual liberty can exist only to the extent that it does not interfere with the rights and health and safety of the other members of the society; two, the principle that every society may legislate to protect its very existence against destruction by individual members of society. These principles directly relate to the taking of compulsory measures to isolate, detect or prevent cases of communicable and transmittable diseases which one member of society may, in some way or other, pass on to other members of society.

The care and treatment of non-communicable diseases falls within that "sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government." *Jacobson v. Massachusetts*, 197 U.S. 11, 29, 25 S.Ct. 358, 41 L.Ed. 643.

It is one thing for public health services to determine

that a physically healthy society is a strong and desirable society and to attempt to convince the public of the validity of certain health measures by means of open and frank persuasion in a democratic manner, but it is quite another thing for any group, no matter how learned, to compel individuals to be "healthy" in cases where the individual's health or ill-health cannot be transmitted to anyone else, and in addition to tell them, as well, just how to be "healthy," even though the method chosen may conflict with the individual's own judgment and that of his doctors. Yet that is exactly what Ordinance No. 323 is designed to accomplish.

Courts have frequently talked of principles in connection with cases upholding health regulations, and well they should, provided, that these principles are not tortured beyond recognition by every new development.

In the *Jacobson* case, Mr. Justice Harlan spoke of "the safety of others" and of the "principle" of self-defense and its corollary, the right of the state to restrict individual liberty so as to prevent some individuals from harming other members of society.

Resting squarely upon the principles of the *Jacobson* case is the case sustaining compulsorly sterilization of a feebleminded woman. Mr. Justice Holmes stated the basis of the court's decision as follows:

> "The principle that sustains compulsory vaccination is broad enough to cover cutting the fallopian tubes." *Buck v. Bell*, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000.

Feeblemindedness is a well-known disease which may be transmitted by heredity, and the principle that so-

ciety may act to prevent its individual members from spreading their diseases or defects to other members of society is the basis for Mr. Justice Holmes decision. The legislature had not legislated to protect the health of Carrie Buck, but had legislated only to prevent the "spread of the disease" and, therefore, the court correctly ruled that society could act "in order to prevent our being swamped by incompetence" (p. 207).

The application of this principle to laws providing for sterilization was reiterated in the concurring opinion of Mr. Chief Justice Stone in *Skinner v. Oklahoma*, 316 U.S. 535, 625 S.Ct. 1110, 86 L.Ed. 1655.

Citing *Buck v. Bell, supra*, the Chief Justice said:

> "Undoubtedly a state may, after appropriate inquiry, constitutionally interfere with the personal liberty of the individual to prevent the transmission by inheritance of his socially injurious tendencies." *Skinner v. Oklahoma*, 316 U.S. 535, 544.

If there was any doubt left by the language of Mr. Justice Holmes as to the principle which allows the state to pass sterilization laws in certain cases, that doubt is resolved by the language in the *Skinner* case.

The principle of the *Jacobson* case, *supra*, reaffirmed in the case of *Buck v. Bell, supra*, is that society may protect itself and all its members by enacting measures designed to prevent individuals from transmitting defects or diseases to other members of society. This principle supports cases upholding quarantine laws, cases allowing for the control or prevention of venereal disease, and, in fact, all cases which uphold laws concerned with the control and prevention of contagions or con-

municable diseases or defects. See *State ex rel. McBride v. Superior Court*, 103 Wash. 409, 174 Pac. 973 (venereal disease case). It is a principle which has no relevance to the issues involved in fluoridation legislation."

The theory, and the only theory which could support Ordinance No. 323 is that society may enact "health measures" requiring people to submit to treatments which the legislating body deems to be good for them.

On identical sets of facts the Supreme Court of Canada and the Supreme Court of Indiana have held legislation providing for the addition of fluoride to public water systems beyond the power of the municipality enacting such legislation.

In *Municipality of Metropolitan Toronto v. Village of Forest Hill* (1957) 9 D.L.R.(2d) 113, affirming (1955) 5 D.L.R.(2d) 621, the Supreme Court of Canada held a by-law authorizing the Municipality of Metropolitan Toronto to fluoridate its public water supply to be beyond its power under a statute authorizing it to regulate the time, manner, extent and nature of the supply of water from its water works system, and every other matter or thing related to or connected therewith which it may be necessary and proper to regulate in order to secure to the inhabitants of the Metropolitan Area a continued and abundant supply of pure and wholesome water. Mr. Justice Rand stated:

> "But it is not to promote the ordinary use of water as a physical requisite for the body that fluoridation is proposed. That process has a distinct and different purpose; it is not a means to an end

of wholesome water for water's function but to an end of a special health purpose for which a water supply is made use of as a means.

"The method proposed does not appear to be the only feasible mode of making available to the public what is considered by the municipality to be a desired health ministration. *Fluoridation apparently can be provided otherwise than by making it general in the water supply.* If that is so, there is here neither that accepted desirability for its use nor an unobjectionable manner of supplying it which in other situations might be influential considerations in the determination of the question raised." p. 118. (Emphasis supplied.)

Mr. Justice Cartwright observed:

"If, on the evidence in the record, it could properly be regarded as action by the council to provide a supply of pure and wholesome water or to render more pure and wholesome a supply of water already possessing those characteristics I would hold it to be valid. But in my opinion, it cannot be so regarded. Its purpose and effect are to cause the inhabitants of the metropolitan area, whether or not they wish to do so, to ingest daily small quantities of fluoride, in the expectation which appears to be supported by the evidence that this will render great numbers of them less susceptible to tooth decay. The water supply is made use of as a convenient means of effecting this purpose. In pith and substance the by-law relates not to the provision of a water supply but to the compulsory preventive medication of the inhabitants of the area. In my opinion the words of the statutory provisions on which the appellant relies do not confer upon the council the power to make by-laws in relation to matters of this sort." pp. 123-124.

In *Teeter v. Municipal City of LaPorte*, 236 Ind. 146, 139 N.E.(2d) 158, the Supreme Court of Indiana reversed the trial court which had sustained a demurrer to a complaint alleging, in part:

> "27. That the toxic qualities of fluorines affect the health and physical condition of different persons in various manners, some being peculiarly allergic to same, and to require the entire population of said city to ingest them, particularly when artificially and mechanically added, would have a cululative [cumulative] toxic effect, particularly upon the aged, the ill, and those suffering from chronic physical ailments, particularly cancer." p. 160,

holding that it could not state as a matter of law that the above quoted allegations were untrue. The Supreme Court of Indiana distinguished the case before it from previous cases decided both by this court and by state courts sustaining the fluoridation of water supplies, and said:

> "The second ground of the demurrer was for failure to state facts sufficient to constitute a cause of action We do not deem it necessary to consider all the reasons and arguments cited in the memorandum to the demurrer in support of this ground. There is nothing in the memorandum whereby we would be authorized to hold that rhetorical paragraph 27 of the amended complaint is untrue as a matter of law. We do judicially know many cases have decided that fluoridation of public water supply is a reasonable exercise of the police power. *Baer v. City of Bend*, 1956, 206 Or. 221, 292 P.2d 134; *Kraus v. City of Cleveland*, 1955, 163 Ohio St. 559, 127 N.E.2d 609, appeal dismissed 1956, 351

U.S. 935, 76 S.Ct. 833, 100 L.Ed. 1463; *Froncek v. City of Milwaukee*, 1955, 269 Wis. 276, 69 N.W.2d 242; *Dowell v. City of Tulsa*, Okl. 1954, 273 P.2d 859, certiorari denied 1955, 348 U.S. 912, 75 S.Ct. 292, 99 L.Ed. 715; *Kaul v. City of Chehalis*, 1954, 45 Wn.2d 616, 277 P.2d 352; *Chapman v. City of Shreveport*, 1954, 225 La. 859, 74 So.2d 142, appeal dismissed 1954, 348 U.S. 892, 75 S.Ct. 216, 99 L.Ed. 701; *De Aryan v. Butler*, 1953, 119 Cal. App.2d 674, 260 P.2d 98, certiorari denied 1954, 347 U.S. 1012, 74 S.Ct. 863, 98 L.Ed. 1135. Only one of these cases was an appeal from a judgment on a demurrer, and there were admissions made by counsel in an oral argument and it does not appear the complaint alleged fluoridation had toxic effects." page 160.

Dissenting in *Kaul v. Chehalis* (1954) 45 Wn.(2d) 616, 277 P.(2d) 352, Judge Frederick G. Hamley, now Judge of the United States Court of Appeals for the Ninth Circuit, warned:

> "The principle being established by the majority opinion, even more than the specific deprivation of personal liberty here accomplished, warrants deep concern. The case before us deals with what some will regard as a relatively minor aspect of dental health. But the principle announced is not so limited. It would be equally applicable if fluoridation (or iodination) was being relied upon to counteract goiter or any other noncontagious bodily malady. What future proposals may be made to treat noncontagious diseases by adding ingredients to our water supply, or food, or air, only time will tell. When that day arrives, those who treasure their personal liberty will look in vain for a constitutional safeguard. The answer will be: 'You gave the constitution away in the *Kaul case*.' " p. 640.

In a speech reported in the Paterson Evening News of Friday, November 6, 1953, Leonard A. Scheele, Surgeon General of the United States, told a conference of state and territorial health and hospital authorities:

> "The nation-wide research effort . . . will produce sooner than we think findings capable of turning public health work upside down. . . .
>
> "Medical research is on the verge of remarkable advances in our knowledge of chronic diseases, viral diseases and mental diseases, as well as in our basic understanding of the human organism and its functioning. . . . "

The article goes on to report:

> "Dr. Scheele, in discussing mass application methods for preventing non-infectious diseases, said a case in point was fluoridation of public water supplies to reduce tooth decay.
>
> "Such a community-wide attack on 'far more serious diseases than dental decay' probably will be forthcoming after laboratory tests have paved the way, he predicted."

If the courts have any doubt as to the implications of the fluoridation cases, certainly the health authorities do not.

In an Editorial in Public Health Reports, Vol. 66, No. 5, February 2, 1951, p. 129, Joseph W. Mountain, Assistant Surgeon General and Associate Chief, Bureau of Statistics, Public Health Service, stated the aims of the public health program:

> "In recent years we have been witnessing a steady broadening of the horizons of public health.
>
> . . . .
>
> "The goal for each person suffering from ill

> health or disability of any kind, for example, is a multiple one. The person *must* be found, he *must* be given the best medical treatment that can be provided, he *must* be physically and mentally rehabilitated, and he *must* retake his place in society, insofar as possible, by making full use of all his resources." (Emphasis supplied). p. 129.

In California's Health, official publication of the California State Department of Public Health, Volume 12, Number 3, dated August 1, 1954, Wilson G. Smile, M.D., Professor of Preventive Medicine and Public Health, Cornell University Medical School, outlined the aims of the new health program:

> "1. The community (the state) will continue to assume responsibility for the health protection of all the people, all ages, all classes, all groups in the community." p. 18.

The comprehensive program of compulsory community-wide medical care being formulated and advocated by "public health authorities" includes the treatment of mental illnesses.

The basic question involved is the dignity and individual liberty of the person, a liberty which should not be restricted where no harm to others can result from its exercise.

A diversity of opinion is essential to free political institutions and scientific progress. A vital diversity of opinion requires not only the opportunity to hold and express beliefs, but the opportunity to practice and to adhere to such beliefs wherever it is possible to do so without harming other members of society.

Medicine, in the field of noncommunicable and non-

transmittible diseases, is one field wherein it is possible for the public to enjoy the benefits of diverse medical opinion without one member of society threatening the health of other members.

The value of such diversity has been recognized in the state of Washington by statutes authorizing the licensing to practice healing arts of adherents of the following schools of healing:

Chiropody RCW 18.22;
Chiropractic RCW 18.25;
Dentistry RCW 18.29;
Drugless healing RCW 18.36;
Optometry RCW 18.53;
Osteopathy RCW 18.57;
Physicians and surgeons RCW 18.71;
Psychologists RCW 18.83.

Which of the above schools of healing a citizen elects to entrust with the care and treatment of his body and mind, or, indeed, whether he will so entrust any one of them or more, is a decision which the constitution and good sense leave solely to the individual concerned. *The enforcement of Ordinance No. 323 will deny to residents of the Town of Fircrest any liberty of choice in the manner of the care of their and their children's teeth.*

Medical science, for all its wonders, and spectacular achievements, has often exhibited a tendency to rush ahead too quickly and to adopt and put into practice theories which are later discarded because their harmful effects, tardily discovered, outweigh their apparent beneficial ones.

Fluoridation is by no means the first attempt to inject medicine into public water supplies.

As early as 1923 two American cities, Rochester, New York, and Anaconda, Montana, were putting iodine into the water to prevent endemic goiter.

In Volume 42 of the Public Health Reports, No. 20, p. 1355, May 20, 1927, Robert Olesen, surgeon, United States Public Health Service, had this to say about the iodization of public water supplies:

> "Unfortunately, the consumption of water varies within a wide range, some individuals drinking considerable water, while others use relatively small quantities. However, the amount of iodine present in properly treated water is so minute that no harm could possibly result from excessive consumption of water. On the other hand, it is conceivable that these same minute doses of iodine will prevent simple enlargement of the thyroid gland. At the same time, it must be conceded that the iodine obtained from treated water is likely to be uncertain in quantity. The objections raised against the use of iodized drinking water as a means of preventing endemic goiter have been numerous. The strongest disapproval has come from the group which discredits all attempts of scientific medicine to minimize the prevalence of disease. Iodization of drinking water is termed by them a 'doping' or poisoning process. In view of the minute quantities of iodine used and the scientific premise on which the procedure is based, the objections of an organized minority may be somewhat discounted. There are, however, certain apparently legitimate objections which deserve consideration. Among these may be mentioned the possibility of inaugurating toxicity in apparently benign goiters, excessive cost, waste, offensive taste,

undesirable chemical combinations and the like." pp. 1359-1360.

Dr. Olesen thereupon proceeds to discuss and analyze these objections. His conclusion is that the iodization of public water supplies, in its present state of development, cannot be recommended for widespread adoption, adding that "the measure appears to be theoretically sound and promising as a means of reducing goiter incidence when correctly used." However, at the time this report was published, the two cities referred to above had adopted and were practicing iodization, while other cities which had put iodine in their water, had speedily abandoned the process because of numerous objections from the residents.

In other words, despite the uncertainty and disagreement among medical authorities, two cities in the United States, acting under the theory now sought to be established by the fluoridation cases, compelled their inhabitants to subject themselves to taking iodine through the water supply, a method of providing the body with iodine which has since been discredited.

Iodine may now be obtained through the purchase of iodized salt. But it is also possible to purchase non-iodized salt. The individual may choose how he wishes to protect his health. He may follow the advice of his own personal physician in respect to iodine. But in respect to fluoride, the citizen is to be denied this choice.

As in the case of administering iodine to prevent goiter, there are other optional, safe alternative methods of administering fluoride, and the same choice should

be afforded each person, since none can be injured by another's decision not to use it.

The dangers of such experimentation, which are inevitable once the principle of compulsory treatment for non-contagious disease is established, are great. The public necessity for such measures has never been demonstrated.

The importance of ascertaining the constitutional limits within which legislatures may exercise the police power in the name of public health has been well illustrated by the decision of this court on May 4th, 1959 in *Frank v. Maryland*, 27 L.W. 4304, where this court divided five to four in sustaining the search by the Commissioner of Health of a private dwelling without any warrant although no particular reason was alleged why a warrant could not have been procured.

A long history of human experience has shown that what the majority or the "weight of authority" holds to be truth today is not necessarily truth tomorrow. Every application of medicine or chemicals to the human body is, in a sense, an "experiment."

> "The triumphs of science are due to the substitution of observation and inference for authority. *Every attempt to revive authority in intellectual matters is a retrograde step*, and it is part of the scientific attitude that the pronouncements of science do not claim to be certain, but only to be the most probable on present evidence." Bertrand Russell, The Impact of Science on Society, p. 89 (Emphasis added).

Yet in the face of this fallibility, uncertainty, and the constant change in medical opinion, courts upholding

fluoridation have allowed legislatures to compel individuals to submit to the current weight of medical opinion and to subject themselves to what is currently accepted as desirable and beneficial treatment. Such courts have chosen to answer Alexander Pope's rhetorical question, "Who shall decide when doctors disagree?" Moral Essays, Epistle III, line 1. And the answer they give is, "The legislature shall decide," adding parenthetically and without any possible significance, "within reason, of course." The dangers in allowing such a compulsion where it is not necessary to protect society from the spread of contagious diseases are obvious.

Concluding his dissenting opinion in *Kaul v. Chehalis*, quoted in part above, Judge Hamley emphasized the ultimate question here for review as follows:

> "The question which I asked in my dissent in *State ex rel. Holcomb v. Armstrong*, 39 Wn.(2d) 860, 873, 239 P.(2d) 545, now becomes more urgent than ever:
>
> "'Can we, . . . withstand the insidious erosion [of our basic liberties] produced by a multiplicity of little instances where, as here, a guaranteed right is set aside because it interferes with what is said to be good for us?"

Respectfully submitted,

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July 6, 1959

APPENDIX A

Opinion of the Supreme Court of Washington in the Instant Case and Judgment Appealed From

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

PATRICIA I. BIRNEL, *Appellant*, vs. THE TOWN OF FIRCREST, *Respondent*.	No. 34857 EN BANC Filed February 26th, 1959

PER CURIAM—Plaintiff commenced this action to have ordinance No. 323 of the town of Fircrest declared unconstitutional and to enjoin the town from adding to the city water supply

> ". . . a source of fluoridation approved by the State Department of Health . . . under the rules and regulations of the State Board of Health, such addition to be administered in a manner approved by the State Department of Health."

A demurrer was sustained to plaintiff's amended complaint; she elected not to plead further and now appeals from a judgment dismissing her action with prejudice.

The judgment is affirmed on the authority of *Kaul v. Chehalis*, 45 Wn.(2d) 616, 277 P.(2d) 352 (1954).

It is so ordered.

We dissent for all of the reasons urged in the three dissents in *Kaul v. Chehalis* (1954), 45 Wn.(2d) 616, 277 P.(2d) 352.

HILL, J.
DONWORTH, J.
FOSTER, J.